

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JEFF BOARDMAN, et al.,)
Plaintiffs,)
v.) No. 1:15-cv-00108-MC
PACIFIC SEAFOOD GROUP, et al,)
Defendants.)

BEFORE THE HONORABLE JUDGE MICHAEL MCSHANE

ORAL ARGUMENT

May 26, 2017

Friday

11:05 A.M.

FOR PLAINTIFFS: MR. MICHAEL HAGLUND
MR. ERIC BRICKENSTEIN
(Appearing by telephone.)

FOR DEFENDANTS: MS. RACHEL LEE

MR. TIMOTHY W. SNIDER

(Appearing by telephone.)

1 FRIDAY MAY 26, 2017 11:10 A.M.

2
3 THE COURT: Hi, folks. This is Judge
4 McShane. Thanks for joining me. Why don't I have
5 the attorneys introduce themselves for the record,
6 starting with plaintiffs' counsel.

7 MR. HAGLUND: Mike Haglund and Eric
8 Brickenstein for plaintiffs, Your Honor.

9 THE COURT: Thank you.

10 MS. LEE: Rachel Lee and Tim Snider
11 for defendants, Your Honor. And with us is -- I
12 understand in-house counsel for Pacific Seafood is
13 also on the line.

14 THE COURT: Who is that again? Do we
15 have that person on the line?

16 MR. OCCHIPINTI: Yes, Your Honor.
17 Daniel Occhipinti, in-house counsel for Pacific.

18 THE COURT: Great. Thank you. All
19 right. Sorry about the delay a little bit this
20 morning. We share a court reporter down in Eugene,
21 and we had to wait for the court reporter. But I
22 did want to go ahead and put this on the record.

23 And I'm sorry that I did not make it
24 to Portland. I know we were going to do it in
25 person there. But I've read your briefings.

1 I've gone back through a lot of the filings in the
2 case to kind of remind myself of where we're at.

3 I guess -- I don't want to spend a lot
4 of time arguing basically whether we should be going
5 forward or whether the plaintiffs have waived their
6 objections by the delay in responding to the request
7 for production. I guess I would like to really talk
8 more about where we are going with this case.

9 I guess from my perspective this case
10 just doesn't -- it's really a bench trial that's
11 going to rely primarily on experts who are familiar
12 with the market. And we seem to be getting into
13 some minutia of individual information by individual
14 fishermen that I just -- I'm having a hard time
15 understanding how helpful that's going to be
16 ultimately to me at a bench trial to determine
17 whether there's a violation of monopolistic
18 practices under the Sherman or Clayton Act.

19 Maybe I can start with the defense in
20 maybe helping me understand why we need the level of
21 information -- navigational records, individual
22 sales records, those kinds of things for experts to
23 really analyze broadly this market.

24 MS. LEE: Certainly, Your Honor.

25 This is Rachel Lee. And so if Your Honor is already

1 familiar with the general outlines in this case, it
2 certainly is true that the documents that we've
3 requested here are necessary and relevant to the
4 analysis and the issues in this case.

5 I'll begin just with what you first
6 pointed to which was -- I believe you said the
7 navigational analysis. So one of the issues in this
8 case is whether the Ocean Gold acquisition would
9 have given Pacific Seafood too much market power.
10 And that depends on what -- you know, obviously a
11 central question for that is: What is the market
12 definition? How narrow or how broad is the relevant
13 market?

14 And so in order to get into that, you
15 need to know where the fishermen were fishing and
16 how far they traveled to deliver their catch,
17 because one of the allegations that the plaintiff
18 has made here is that fishermen don't travel more
19 than 50 to 100 miles from the spot where they fish
20 to the spot where they deliver, and that influences
21 how they are describing the relevant markets. And
22 so we need access to information about how far, in
23 fact, fishermen do travel. That's information the
24 experts will need and that is not contained within
25 the PacFIN or AKFIN databases.

1 And we also need information about
2 what the fishermen -- not just what the fishermen,
3 in fact, fished for and sold, but what their other
4 options were in terms of other seafood products that
5 they could have substituted for fishing in these
6 markets or fishing for the types of seafood that
7 plaintiffs are arguing Pacific Seafood had
8 monopolized.

9 So we need information about what
10 other types of permits they had, where they could
11 have fished, what kinds of things they could have
12 fished for, where they could have sold, their
13 communications about these things -- that's all
14 directly relevant, and it's information that we
15 can't get except by getting it in discovery from the
16 plaintiffs themselves.

17 Another issue here specifically is the
18 issue of antitrust standing and antitrust injury.
19 We think that some of these plaintiffs don't even
20 fish in the markets they claim will be harmed by the
21 acquisition or don't even do business with Pacific
22 Seafood or Ocean Gold. And that creates a standing
23 problem for them, and it specifically implicates a
24 rule about what's called antitrust standing or
25 antitrust injury. And so we need the documents

1 about where these plaintiffs are fishing, what they
2 are fishing for and --

3 THE COURT: Have you deposed the
4 fishermen yet?

5 MS. LEE: Your Honor, we have not
6 deposed the fishermen yet because we don't have any
7 documents from the fishermen to date. We issued
8 these requests for production almost two years ago.

9 THE COURT: I know. We don't need to
10 go there. I know that. I got that. I know it was
11 a long time ago.

12 MS. LEE: Yes, Your Honor. And what I
13 was going to cap that with is to date, even on the
14 RFP where the plaintiffs served up a response saying
15 they would produce documents, they have not to date
16 produced a single document. We have zero documents
17 from them.

18 So we have not yet deposed the
19 plaintiffs, but obviously that's something we need
20 to do -- and quite soon because our expert reports
21 are due on September 1st. In fact, discovery will
22 be closing at the end of September. Once we get
23 document discovery, then we'll do depositions of the
24 plaintiffs here. We'll need the Court's assistance
25 to compel production of the responsive documents.

1 THE COURT: All right. Mr. Haglund,
2 let me hear from you.

3 MR. HAGLUND: Yes, Your Honor. I
4 would like to emphasize first that this is a case
5 that, on the plaintiffs' side, seeks strictly
6 injunctive relief.

7 THE COURT: Can I interrupt for a
8 moment? That reminds me that I did wish to ask the
9 defense a question. Is the defense asking for a
10 jury trial on your tort style claims?

11 MS. LEE: Your Honor, we have not
12 served a jury trial demand, I don't believe.

13 THE COURT: Okay. So is that no, you
14 are not going to be seeking one?

15 MR. SNIDER: Tim Snider. I don't know
16 if the deadline has passed yet to serve a jury
17 demand. And to be honest with you, I don't recall
18 if one's been served yet or not. It's something we
19 want to talk about with our client. If Your Honor
20 is curious about that, we can promptly supplement
21 with an answer on that.

22 THE COURT: I guess I'm only curious
23 in that if you do wish to have a jury trial on your
24 tort claims, it's going to be a separate proceeding
25 from the bench trial on the Sherman and Clayton Act

1 claims.

2 Quite frankly, I think that may,
3 depending on how I decide the case -- if I decide it
4 in favor the plaintiffs at the bench trial -- I'm
5 not saying I am, but if I did, we might have to
6 rethink when you are going forward on a malicious
7 prosecution case.

8 So they will be severed if we go
9 forward with a jury on the tort claims. I want the
10 parties to know my thinking on that. Not trying to
11 dissuade you from doing that, but I don't see us
12 trying the case while a jury sits and listens for a
13 week to experts talking about monopolistic power.
14 We might as well shoot them all in the head. They
15 are going to kill us by the time we're done with
16 that. So it's going to be a separate event, and
17 we'll go from there.

18 But if we were trying it all together,
19 that's fine, to the Court. But I do want the
20 parties to know what my thinking is on how we are
21 going to proceed if we have a jury trial on the tort
22 claim.

23 I interrupted you, Mr. Haglund.
24 Please go ahead.

25 MR. HAGLUND: Yes, Your Honor. Our

1 case on the plaintiffs' side is strictly for an
2 injunction or a permanent injunction -- strictly
3 injunctive relief.

4 And it's going to be expert --
5 virtually all of our testimony is going to come from
6 experts. And the expert reports are due -- our
7 expert reports are due June 30th. We anticipate
8 getting many rounds of documents, those documents we
9 said we would provide, responsive documents, to
10 defendants within the next couple of weeks by June
11 16.

12 However, the category of documents
13 they've asked for, many don't make any sense to be
14 required to be produced, especially when one takes
15 into account the fact that there is a database that
16 all the states -- or Oregon, Washington, and
17 California, which are the three states that make up
18 the West Coast seafood input markets we are
19 concerned about in this case, all have very
20 comprehensive fish ticket systems that have the data
21 from the fish tickets going into a database that is
22 available to the defense and to us. And it -- you
23 can easily run data sets where -- for the
24 plaintiffs' vessels that are in this case -- and
25 this is the subject of an interrogatory that we are

1 going to respond to. We are assembling that data
2 now. We are going to be listing from the PacFIN
3 database the date, the catch, the delivery point --
4 all that data is going to be available to them in
5 the interrogatory answers that we are trying to
6 complete here in the next couple of weeks.

7 So they want to go way beyond that
8 sort of data and want for example the -- the
9 documentation of all of our Coast Guard licenses and
10 permits. They want all the information, in number
11 9, about how the captains and crew are paid. That
12 has no relevance to anything we're seeking. We
13 don't seek any damages. It would be relevant from
14 an antitrust standing perspective if we were seeking
15 damages in this case for price suppression, but we
16 are not.

17 Number 10, they seek all of the
18 surveys, appraisals, or valuations of our fishing
19 boats. We can't imagine what that's relevant to.

20 They seek -- multiple requests are
21 devoted to what have we done in terms of holding or
22 transferring quota share. That's not an issue in
23 this case.

24 And then they want all of our
25 financial statements. We are not seeking any

1 damages. It makes no sense for my clients to be
2 subjected to these types of overbroad document
3 requests.

4 THE COURT: All right. Thank you,
5 Mr. Haglund. Any final word by defense?

6 MS. LEE: Yes, Your Honor. Thank you.
7 So I think I have three points in response to what
8 Mr. Haglund said, beginning with his argument that
9 plaintiffs will be putting on their case solely
10 through expert testimony. And that's plaintiff's
11 prerogative if they want to put on their case solely
12 through experts. But we are entitled to have
13 testimony from the plaintiff and entitled to records
14 and discovery from the plaintiff. That's my first
15 point.

16 The second point is Mr. Haglund argued
17 that it doesn't make sense to require production of
18 documents beyond what's in PacFIN and AKFIN. We are
19 of course entitled to impeach whatever may be the
20 records entered into the database. But in addition,
21 as explained in our reply, the PacFIN database
22 doesn't record all the relevant information that's
23 on fish tickets. And we are seeking many, many
24 relevant documents beyond what's on the fish ticket
25 info, as we listed in our reply, and we are seeking

1 communications and statements by plaintiffs about
2 prices, testimony about payments, quotas, and
3 finances of its fishing operations.

4 And so we are entitled to both the
5 level of detail that's actually in plaintiffs'
6 records, information about where they are fishing,
7 and these additional items. Those are definitely
8 relevant to key issues in this case speaking to both
9 market definition and the other options that
10 plaintiffs have for selling their fish.

11 It's also relevant to a theory of how
12 they've been harmed in this case. Their argument is
13 ex-vessel prices are being suppressed by Pacific
14 Seafood below the levels of what pricing would be in
15 a less concentrated market. So we are entitled to
16 inquire into the prices and the effects of those --
17 the prices for those seafood products are having on
18 the finances of a fishing operation and on the
19 valuation of the vessels and the equipment and the
20 fishing permits and the quota. We are entitled to
21 have -- our experts would be able to get into the
22 level of detail that allows them to compare the
23 finances and profits of the plaintiffs fishing for
24 these types of seafood as opposed to the finances
25 and profits that fishermen are earning in less

1 concentrated markets or as to other types of
2 seafood.

3 So the PacFIN database is absolutely
4 not a substitute for the discovery that we are
5 seeking here.

6 And then finally as to some of the
7 specific kinds of document requests that he is
8 pointing to here -- we go through some of this in
9 our reply brief -- but he objects to producing
10 information about the Coast Guard licenses and
11 permits. As I alluded to earlier, those are
12 relevant to the question of what other options
13 plaintiffs have in terms of where they fish. And
14 that is directly tied into where they fish and what
15 they fish for and their options, directly tied into
16 the relevant market analysis.

17 Mr. Haglund argues that the question
18 of compensation is not relevant because damages are
19 not at issue. We understand that plaintiffs are
20 seeking injunctive relief. But their theory of harm
21 here and their theory of anti-competitive conduct
22 rests on the economics and finances of how this
23 market operates and what its effect is on fishing
24 operations. So it is definitely relevant and
25 something that our experts want to look into to

1 investigate how these fishing businesses operate,
2 what they take in, how they compensate their crews,
3 how those (inaudible).

4 THE COURT: That seems like such a
5 stretch because, you know, the success of the
6 individual fishermen isn't at issue. The question
7 is whether competition is being suppressed and they
8 could be more successful. It doesn't matter if they
9 are in default on loans or their boats are paid off.
10 I don't know how that is possibly going to impact
11 the decision I'm going to make or, quite frankly,
12 what your experts are going to say.

13 MS. LEE: Your Honor, we think that it
14 is relevant here because the fishermen may be
15 fishing for different kinds of seafood other than
16 the three -- so here they've alleged there are three
17 seafood products where there is suppressed ex-vessel
18 pricing -- groundfish, onshore whiting, and cold
19 water shrimp. What plaintiffs are earning on those
20 products and how that affects their operations as
21 opposed to what the dynamics are of markets that are
22 less concentrated goes to the question of whether or
23 not Pacific Seafood is in fact squeezing these
24 fishermen unfairly and acting to the detriment --
25 the financial detriment of the fishermen, Your

1 Honor.

2 THE COURT: Again, I just don't think
3 that's the issue. I think you are misstating the
4 issue that I have to find in this case. That's not
5 the issue under the Sherman and Clayton Act, that
6 they are squeezing somebody. It has do with unfair
7 competition practices. It's broader than that.

8 MR. HAGLUND: Your Honor, this case is
9 at a different level. It's all about competition in
10 a broad and more generic way. It doesn't get down
11 to the level of detail of individual fishermen
12 that's being argued.

13 THE COURT: With regard to the issue
14 of whether the plaintiffs waived their objections to
15 the RFP by waiting nine months, I'll look at the
16 factors involved. Nobody's been knocking themselves
17 out to get this issue resolved. I think it was the
18 defense that asked for a stay that lasted a year so
19 that they could get through their appeal rather than
20 conduct discovery.

21 Nobody mentioned this at the status
22 report that I requested, that there were -- there
23 had been outstanding discovery issues for a long
24 period of time. This is something that should --
25 should have been brought to my attention seven or

1 eight months ago. Nine months is clearly a long
2 time.

3 The plaintiffs haven't given any great
4 reason for the delay, but on this record I don't see
5 there's any evidence of bad faith. I don't see any
6 great prejudice to the defense. We have plenty of
7 time.

8 This is also -- we have to keep in
9 mind this is also a bench trial. It is not as if we
10 can't get more information. Quite frankly, if
11 during trial I don't feel like I have all of the
12 information necessary to make the right decision --
13 I mean, we can carry the matter and get more
14 information, get more information to the experts if
15 necessary and, you know, get the facts that I need
16 to make the right decision.

17 So I don't see that anybody's going to
18 be prejudiced by going forward with the objections
19 the plaintiffs have made to the requests for
20 production, especially in light of the fact that at
21 least from my perspective many of the requests are
22 overbroad.

23 The defense, of course, I know
24 disagrees with me on that, but many of these
25 requests do appear to me to be overly broad and only

1 tangentially relevant -- sometimes just not relevant
2 in my view of where this case stands. Some of them
3 are just vague, and many of them I think just
4 ultimately are not proportional to the needs of the
5 case.

6 So I'm going to consider the
7 plaintiffs' objections despite their tardiness.

8 Let's look first at requests 4 through
9 7. These are where defendants are seeking logbooks,
10 electronic and navigational data, and other
11 information. I mean, I guess I would say in general
12 to all these requests -- in deciding this case I can
13 just tell you my interest in deciding this case is
14 going to be based on really an analysis of experts
15 in the field based on market data and their
16 experience with the fishing industry.

17 I just don't see this case turning on
18 the navigational data of an individual fisherman on
19 an individual day. I don't see it turning on the
20 individual sale of a particular catch by an
21 individual fisherman on a particular day.

22 And again, if the experts convince me
23 that that kind of data is germane to the decision I
24 have to make about the markets and whether there is
25 a violation of the Sherman or Clayton Acts, then

1 we'll get the information. But right now it seems
2 disproportionate to what I believe are going to be
3 the ultimate issues in the case.

4 I'm going to sustain the objections to
5 requests 4 through 7 finding that they have little
6 relevance and they are not proportional to the needs
7 of the case.

8 And again, I suspect there will be
9 questions about some of these issues in depositions
10 and some of this information is going to be
11 gathered.

12 With regard to requests 1 through 3,
13 29, and 32, these seek documents summarizing all
14 seafood sales from January 2010 to present. Again,
15 I'm going to find that they do not have sufficient
16 relevance and are not proportional to the needs of
17 the case.

18 Request number 8 which seeks
19 information about regulatory constraints such as
20 Coast Guard and other fishing licenses for
21 plaintiffs, I'm having a hard time understanding the
22 relevance. And I think in deposition -- I mean,
23 certainly the parties know what regulatory
24 constraints exist.

25 If after depositions it appears that

1 we need more information regarding specific
2 regulatory constraints, we can look further at
3 production of documents. But it seems like
4 something fairly easy to ferret out in depositions
5 with some questions.

6 Requests number 9, 10, and 14 have to
7 do with plaintiffs' profits and valuations of the
8 vessels it uses. I'm sustaining the objection on
9 grounds of relevance.

10 Requests 11 through 13, these have to
11 do with the plaintiffs' Individual Fishing Quotas
12 and Individual Transfer Quotas. Again, I'm
13 sustaining the objection on grounds of relevance and
14 proportionality.

15 Request number 17 which seeks
16 communications related to prices relevant to
17 ex-vessel pricing, it's a very broad request. I
18 don't know how to begin to determine what this is --
19 how broadly -- I mean, communications related to
20 prices is broad. Again, at this stage I'm finding
21 that the defense has not made a requisite showing
22 that it's relevant given the needs of the case. If
23 at a later time when we look at the expert reports
24 it appears that this particular type of information
25 becomes relevant, we can revisit the matter at that

1 time.

2 Request 15 and 16, countervailing
3 power documents, I'll overrule the objection to
4 that. It may have some relevance to determining the
5 markets.

6 Request number 24, communications
7 about this lawsuit, I'll grant with regard -- I
8 guess this goes towards what ultimately is the tort
9 claims, whether there was some malfeasance in
10 bringing the prosecution. So it seems the plaintiff
11 is willing to turn over any non-privileged,
12 non-work-product related documents that are related
13 to the lawsuit. That seems appropriate. I'm not
14 going to get into an argument about whether the
15 appropriate word is "about" or "related". I can see
16 no difference.

17 What I'm ordering the plaintiffs to
18 do, if they are in possession of documents that are
19 not privileged, not work product, containing
20 communications relating to the lawsuit, that needs
21 to be turned over.

22 Request 33 to 34, this is generally
23 seeking documents relevant to the existence of
24 economically distinct geographic markets. This is
25 going to be in the expert reports, so I'm going to

1 grant -- I'll sustain the objection to requests 33
2 through 34.

3 Is there anything I'm missing in terms
4 of a request that hasn't been responded to from
5 plaintiff?

6 MR. HAGLUND: Not that I'm aware of,
7 Your Honor, looking at it.

8 THE COURT: From defense?

9 MS. LEE: Your Honor, I'm trying to
10 look through here.

11 THE COURT: We'll get a minute order
12 out just outlining specifically which have been
13 sustained, which have been overruled. I think I've
14 covered all the ones that you've mentioned in your
15 briefing. If I haven't -- if I've missed one, just
16 simply send an email to Ms. Pew. I'll take a look
17 and issue a ruling on it. I think that's the
18 easiest way to do that.

19 Let's get the minute out order out.
20 If there's something we missed, we can deal with
21 that. We've got expert report deadlines. I assume
22 you are moving forward on scheduling depositions.
23 Is there anything else that I can help you with
24 today?

25 From the plaintiff first. Anything?

1 MR. HAGLUND: No, Your Honor.

2 THE COURT: All right. From defense?

3 MS. LEE: No, Your Honor. Thank you.

4 THE COURT: Okay. Thank you very

5 much. We will go off the record.

6 (The hearing was concluded

7 at 11:38 a.m.)

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1 State of Oregon)
2 County of Lane) ss.

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4 I, Eleanor G. Knapp, CSR-RPR, a Certified
5 Shorthand Reporter for the State of Oregon, certify
6 that the witness was sworn and the transcript is a
7 true record of the testimony given by the witness;
8 that at said time and place I reported all testimony
9 and other oral proceedings had in the foregoing
10 matter; that the foregoing transcript consisting of
11 22 pages contains a full, true and correct
12 transcript of said proceedings reported by me to the
13 best of my ability on said date.

14 If any of the parties or the witness requested
15 review of the transcript at the time of the
16 proceedings, such correction pages are attached.

17 IN WITNESS WHEREOF, I have set my hand and CSR
18 seal this 12th day of June 2017, in the City of
19 Eugene, County of Lane, State of Oregon.

20
21 

22 Eleanor G. Knapp, CSR-RPR

23 CSR No. 93-0262

24 Expires: March 31, 2018
25